



September 18, 2001

Ms. Kimberly A. Frost  
Vinson & Elkins, L.L.P.  
600 Congress Avenue, Suite 2700  
Austin, Texas 78701-3200

OR2001-4168

Dear Ms. Frost:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152085.

The Port of Houston Authority Police Department (the "department"), which you represent, received a request for all information regarding a specified officer, including internal affairs history, disciplinary actions, employment dates, and level of certification. You state that you have released approximately 134 pages of information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.117 of the Government Code. We have considered your exceptions and reviewed the submitted information.

You contend that the submitted investigation in Exhibit B is excepted under sections 552.101 and 552.102 of the Government Code in conjunction with common law and constitutional privacy. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the act. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).<sup>1</sup> Accordingly, we will consider your section 552.101 and section 552.102 claims together.

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<sup>1</sup>Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the right of privacy.

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

The public, however, has a legitimate interest in knowing reasons for an employee's demotion or the reasons for disciplinary action. See Open Records Decision Nos. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 329 (1982) (reasons for an employee's resignation are not ordinarily excepted by constitutional or common law privacy). After reviewing the submitted information, we conclude that there is a legitimate public interest in the submitted investigation and, therefore, the information in Exhibit B is not excepted under sections 552.101 and 552.102 in conjunction with common law and constitutional privacy. Thus, you may not withhold the submitted information in Exhibit B under sections 552.101 and 552.102 in conjunction with privacy.

You also contend that the identity of the individual who filed a complaint with the department should be withheld under section 552.101 in conjunction with the informer's privilege. The Texas courts have recognized the informer's privilege. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). In this instance, the complainant reported a violation of law to the department, the subject's employer. Although the department is a law enforcement authority, the submitted information reveals that the City of Houston Police Department has jurisdiction over the alleged violation of law. Thus, the complainant filed a report with the subject's

employer, rather than reporting the alleged violation of law to the governmental body, the City of Houston Police Department, which has criminal law enforcement authority over the reported activity. Thus, we conclude that the informer's privilege is inapplicable and does not protect the complainant's identity.

You also assert that the marked portions of Exhibit A and the submitted documents in Exhibit B are excepted under section 552.117 of the Government Code. Section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer complied with section 552.024 of the Government Code. *See also* Open Records Decision No. 670 (2001) (providing that a governmental body may withhold the home address, home telephone number, personal cellular phone number, personal pager number, social security number, and family member information of a peace officer without requesting a decision from this office). Section 552.117(2) applies to a "peace officer" as set forth in article 2.12 of the Texas Code of Criminal Procedure. Therefore, we conclude that you must withhold the information that you marked in Exhibit A under section 552.117(2) of the Government Code.

With regard to Exhibit B, we have marked the information that you must withhold under section 552.117 of the Government Code. We conclude that the remaining information in Exhibit B, which includes a copy of the City of Houston Police Department offense report, may not be withheld under section 552.117. Section 552.117 only protects a governmental body employee's section 552.117 information in the context of his role as an "employee," and not as "suspect" in a criminal investigation. Therefore, you may not withhold this information under section 552.117 of the Government Code.

You also contend that the offense report in Exhibit B-7 "should be withheld under section 552.108(a)(2) because it relates to an ongoing investigation." Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a *final result* other than conviction or deferred adjudication. Because you state that the investigation is ongoing, the investigation has not concluded in a *final result* other than conviction or deferred adjudication. Thus, you have failed to show the applicability of section 552.108(a)(2) of the Government Code to the submitted offense report. Therefore, we conclude that you may not withhold the offense report in Exhibit B-7 under section 552.108(a)(2) of the Government Code.

We note, however, that the offense report in Exhibit B-7, as well as the information in Exhibit B-5, contains driver's license numbers which are excepted under section 552.130 of the Government Code. Section 552.130(a) of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, you must withhold the marked driver's license numbers in Exhibits B-5 and B-7 under section 552.130(a) of the Government Code.

Exhibit B-7 also contains social security numbers which are not excepted under section 552.117 of the Government Code. Social security numbers may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* However, it is not apparent to us that the social security numbers were obtained or maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the department to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution the department, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Gov't Code § 552.352. Prior to releasing the social security numbers, the department should ensure that these numbers were not obtained or maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

In conclusion, you must withhold the information that you marked in Exhibit A and the information that this office marked in Exhibit B under section 552.117 of the Government Code. You must also withhold the marked driver's license numbers under section 552.130 of the Government Code. Further, you must also withhold the social security numbers in Exhibit B-7 if the numbers were obtained or are maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. You must release the remaining submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek  
Assistant Attorney General  
Open Records Division

JHB/sdk

Ref: ID# 152085

Enc: Marked documents

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(w/o enclosures)